



Kentucky Law Journal

Volume 23 | Issue 4

Article 1

1935

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Recommended Citation

Evans, Alvin E. (1935) "Testamentary Revocation by Act to the Document and Dependent Relative Revocation," *Kentucky Law Journal*: Vol. 23 : Iss. 4 , Article 1.

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KENTUCKY LAW JOURNAL

Volume XXIII

May, 1935

Number 4

TESTAMENTARY REVOCATION BY ACT TO THE DOCUMENT AND DEPENDENT RELATIVE REVOCATION

By ALVIN E. EVANS*

A will under the Statute of Frauds may be revoked by burning, cancellation, tearing, or obliterating, and under the Wills Act by burning, tearing, or otherwise destroying. It is commonly assumed that the difference in wording is without effect in this country. Most American states follow one or the other English statutes or combine the two, or make unimportant alterations. Thus, while the Indiana statute provides for revocation by destruction or mutilation, the court finds that there is no essential difference between this provision and that of the Statute of Frauds.¹ In New Mexico and Tennessee, no statutory provision is made for revocation by act to the document.² In almost all the states the act, if performed by another, must be done in the presence of the testator and by his direction.³

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¹ See *Woodfill v. Patton*, 76 Ind. 575 (1881); Burns Indiana Statutes Annotated (1933), Sec. 7-301; Bordwell gives a full account of the distinctions, 14 Ia. L. Rev. 1, 287 (1929).

² See *Ford v. Ford*, 26 Tenn. 94 (1846) (intent to revoke, accompanied by direction to burn, equals a revocation, even if the act is not performed); *Smiley v. Gambil*, 39 Tenn. 164 (1858) (burning wrong instrument with intent to revoke the will is a revocation).

³ *Miller v. Harrell*, 175 Ky. 578, 194 S. W. 782 (1917) (Destruction by testator's instructions but beyond his presence not a revocation, and the act cannot later be ratified); see Bordwell, op. cit., p. 289.

1. THE VARIOUS ACTS TO THE DOCUMENT

There is no essential difference between cancellation and obliteration.⁴ The former means etymologically to draw criss-cross lines (*cancelli*, lattice or cross-bars), and the latter (*ob litteram*, against the letter) means the drawing of a line through, or the pasting of some obstruction over words intended to be revoked. Indeed, an erasure may also be an obliteration, but it is also regarded as a species of tearing or cutting. To mutilate means to obliterate, cancel, cut or scratch out, tear, or erase and is a method adapted to partial or total revocation.⁵ Tearing, and especially burning, are better suited to complete revocation, whereas cancellations, interlineations and obliterations are specially suited to partial revocation. Yet, obliteration and cancellation may affect the entire will,⁶ and tearing may affect only the part torn off.⁷

Obliteration of the name of one legatee cannot operate as an entire revocation, even though that result was intended. The act is not appropriate to show such intent.⁸ But the obliteration of an essential feature of a will such as the testator's sig-

⁴ *Jeffett v. Cook*, 175 Ark. 369, 299 S. W. 389 (1927); see 9 Va. L. Rev. 98, where Mr. Battle regards the word "obliteration" as having been derived from "oblinere", to daub.

⁵ *Woodfill v. Patton*, *supra*, n. 1.

⁶ *Townley v. Watson*, 3 Curt. Eccl. 761 (1844); *Giles v. Warren*, L. R. 2 P. & D. 401 (1872).

⁷ *Hartz v. Sobel*, 136 Ga. 565, 71 S. E. 995 (1911) (will cut in many places in order to effect a partial revocation); *Goods of Woodward*, L. R. 2 P. & D. 206 (1871) (eight lines torn from the first page and remainder preserved).

⁸ *Law v. Law*, 83 Ala. 432, 3 So. 752 (1888); see also *Safe Deposit Co. v. Thom*, 117 Md. 954, 83 A. 45 (1912) (Revocation of one item by erasure not appropriate as an entire revocation). But in *Damman v. Damman*, 28 A. 408 (Md. 1894), will was so marked up with partial revocations, though some items were untouched, that court held entire will was revoked. See also *Muh's Succession*, 35 La. Ann. 394 (1883); *Fisher's Estate*, 283 Pa. 282, 129 A. 90 (1925). This sort of judicial revocation is unjustifiable. In *Triplett v. Triplett*, 161 Va. 906, 172 S. E. 162 (1934), it was held that an attested holographic will could not be probated as an attested will where the only significant erasures and alterations were partial revocations, e. g., the amount of the annual salary to testator's manager having been erased and another sum substituted, and the name of one additional trustee being added, were regarded as a total revocation. Clearly there was no total revocation. It was important that the attested will be sustained because testator owned land in Florida which could not pass by an unattested will. See criticism in 21 Va. L. Rev. 342 (1935).

nature is an entire revocation,⁹ though it is a question for the jury whether the testator intended to revoke his will by the cancellation of his signature.¹⁰ In Iowa cancellation is not equivalent to destruction and is ineffective unless attested or unless the act amounts to a complete obscuration of the part intended to be revoked.¹¹ Partial cancellation with pencil is regarded as only a deliberative act in England and alone is not sufficient to alter the will,¹² but the rule is generally contra in the United States,¹³ and a partial revocation in most states may be made by such a cancellation.¹⁴ If the testator cancels a descriptive term like "my son", leaving the name intact, there is no revocation.¹⁵

Though to cancel means to make criss-cross lines, as in lattice work, still the lines may not even cross each other and they need not be straight.¹⁶ Thus, they may form letters and words or sentences and by the expression of the thought of the testator may show even more clearly his intent to revoke. But such words written upon the face of a will are usually not sufficient as a revocatory writing, because they are not attested. Under what circumstances may they be effective as a cancellation? Assuming a jurisdiction which admits of total or partial revocation by cancellation, it should be sufficient if such

⁹ *Jeffett v. Cook*, *supra*, n. 4; *Olmstead's Estate*, 122 Cal. 224, 54 P. 745 (1898); *Glass v. Scott*, 14 Col. App. 377, 60 P. 186 (1900) (lines drawn through signature and intention to revoke declared to witnesses); *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501 (1904). So cutting out the signature is a revocation, *Youse v. Foreman*, 68 Ky. 337 (1869).

¹⁰ *Re Hopkins*, 172 N. Y. 360, 65 N. E. 173 (1902).

¹¹ *Gay v. Gay*, 60 Ia. 415, 14 N. W. 238 (1882); *Richardson v. Baird*, 126 Ia. 408, 102 N. W. 123 (1905) (probate of all that is legible). Note the similarity to the requirements of the English Wills Act.

¹² *Francis v. Grover*, 5 Hare 39 (1845); *Goods of Hall*, L. R. 2 P. & D. 256 (1871).

¹³ *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501 (1904); *Hilyard v. Wood*, 71 N. J. Eq. 214, 63 A. 7 (1906); *Frothingham's Will*, 75 N. J. Eq. 205, 71 A. 695 (1908); *Tomlinson's Estate*, 133 Pa. 249, 19 A. 482 (1890).

¹⁴ *Wikman's Estate*, 148 Cal. 642, 84 P. 212 (1906); *Stuart v. McWhorter*, 238 Ky. 82 (1931) (will traced to testator's possession, executor's name being cancelled). This was the rule in England up to the Wills Act. Thereafter, if a will was found showing an act of revocation, the burden of proof was upon the one who asserted that the revocation was done prior to the Wills Act, after which cancellation was insufficient if the cancelled part was still "apparent"; *Benson v. Benson*, L. R. 2 P. & D. 172 (1870).

¹⁵ *Clark v. Smith*, 34 Barb. 140 (N. Y. 1861).

¹⁶ See *Thompson v. Royall*, 175 S. E. 748 (Va. 1934).

words as "this will is revoked" or any similar words, were written upon the face of the instrument in a place where words of the will appear, at least if they are so placed as to indicate whether the revocation is partial or total.¹⁷ The will consists of the substratum paper and the distribution of ink or lead upon it forming words. The margins and the back are not properly a part of the will, and revocatory declarations on them do not cancel the will, though a will could not exist without margins or back.¹⁸ Where partial revocation is not allowed a note on the margin would, of course, be ineffective,¹⁹ but the same rule holds as to total revocation.²⁰

Cutting²¹ and scratching out, or other erasure with an instrument²² are equivalent to tearing and so are embraced within the statute. It seems that tearing off even an inconsequential part of the will such as a seal, if done with intent to revoke totally, is sufficient where the instrument is referred to as sealed.²³ The tearing out of any essential part of the will, such as testator's signature or those of the attestors, shows an intent to revoke totally.²⁴

¹⁷ *Norsen v. Erkenwick*, 298 Ill. 231, 131 N. E. 622 (1921); but see *Evans' Appeal*, 58 Pa. St. 238 (1868). See note in 3 A. L. R. 833, 837 and 31 Y. L. Jour. 892 (1922).

¹⁸ *Howard v. Hunter*, 115 Ga. 357, 41 S. E. 638 (1902), Note 3 A. L. R. 833; *Oetjen v. Oetjen*, 115 Ga. 1004, 42 S. E. 387 (1902); *Dowling v. Gilleland*, 286 Ill. 530, 122 N. E. 70 (1919); *Sanderson v. Norcross*, 242 Mass. 43, 136 N. E. 170 (1922); *In re Shelton's Will*, 143 N. C. 218, 55 S. E. 705, 10 A. C. 531 (1906), see 3 A. L. R. 833, 14 A. L. R. 1018; *Lewis v. Lewis*, 2 Watts & S. 445 (1841); *Will of Ladd*, 60 Wis. 187, 18 N. W. 734 (1884); *Cheese v. Lovejoy*, L. R. 2 P. & D. 251 (1876). Contra, *Warner v. Warner*, 37 Vt. 356 (1864), and also *Billington v. Jones*, 108 Tenn. 234, 66 S. W. 1127 (1901); 56 L. R. A. 654, and 91 A. S. R. 751 notes.

¹⁹ *Gugel v. Vollmer*, 1 Dem. 484 (N. Y. Sur. 1883).

²⁰ *Akers' Will*, 77 N. Y. S. 643 (1902), affirmed 173 N. Y. 620.

²¹ *Goods of Bleckley*, L. R. 8 P. D. 169 (1883); *Hobbs v. Knight*, 1 Curt. 769 (1838); *Sanders v. Babbitt*, 106 Ky. 646, 51 S. W. 163 (1899) (statute adds cutting).

²² *Goods of Morton*, L. R. 12 P. D. 141 (1887); *Hobbs v. Knight*, 1 Curt. 769 (1838).

²³ *White's Will*, 25 N. J. Eq. 501 (1874) (seal and part of name torn off); *Price v. Powell*, 3 H. & N. 341 (Exch. 1858); *Williams v. Tyley*, 5 Jur. N. S. 530 (P. & M. 1858).

²⁴ *Evans v. Dallow*, 31 L. J. (P. & M) 128 (1862) (signature of attestors torn off); *Abraham v. Joseph*, 5 Jur. N. S. 179 (Ecc., 1859) (same); *Williams v. Tyley*, *supra*, n. 23 (testator's signature torn off) is confusing. The court observes that there is no presumption either way as to the time when interlineations are made and so the burden of proof falls upon the one who asserts that they were made prior to execution. The court makes no distinction between the two uses of interlineations, one at least being made to fill a blank, and others to

It seems that while tearing his will or immediately thereafter, the testator may change his mind and the will is not revoked by the tearing. Thus, even if it is torn in bits by the testator due to information which he decides was erroneous while still employed in the act, he may paste these bits together and preserve the will.²⁵ Nor is a will revoked, though so torn that a portion is almost torn off if testator changes his mind before the act is completed.²⁶ Mere tearing sheets apart that have been attached *inter se* in some fashion does not show an intent to revoke.²⁷ It seems to be the better rule that the tearing out of one or some of several sheets does not work a total revocation.²⁸ Just as a will need not be torn into bits in order to be revoked, so revocation by burning does not require annihilation. In fact, any slight degree of burning or even singeing

make additions and corrections. The use of a different colored ink from that in the original is properly used as the basis of an inference that the corrections were made subsequent to execution.

²⁵ *Giles v. Warren*, L. R. 2 P. & D. 401 (1872). See also *Wood's Will*, 11 N. Y. S. 157 (Sur., 1889) (lines drawn through testator's signature, then these lines and the signature partially erased and signature re-written in ink of a different color); *Sellards v. Kirby*, 82 Kan. 291, 108 P. 73 (1910) (signature partly scratched out and written in again with pencil—no evidence as to order of events—no revocation); *Safe Deposit Co. v. Thom*, 117 Md. 154, 83 A. 45 (1912) (similar. Court also alternately resorts to dependent relative revocation doctrine). But if the signature has once been cut out and later gummed in, the will is revoked, the gumming in being an invalid attempt at revival; *Bell v. Fothergill*, L. R. 2 P. & D. 148 (1870).

²⁶ *Doe v. Perkes*, 3 B. & Ald. 489 (K. B., 1820); *Elms v. Elms*, 1 Sw. & Tr. 155 (Eccl., 1858). But see *Goods of Colberg*, 2 Curt. 832 (Eccl., 1841), where testator repented at a later time. In *Throckmorton v. Holt*, 180 U. S. 552 (1900), a will torn nearly in two and burnt at the margins was not revoked. "But even if it had been found among testator's papers, we incline to think some further evidence beyond its present appearance would be necessary to show he intended to cancel it." So in *Russell v. Tyler*, 224 Ky. 511, 6 S. W. (2d) 707 (1928), preservation of mutilated will is regarded as inconsistent with an intent totally to revoke.

²⁷ *Woodruff v. Hundley*, 127 Ala. 640, 29 So. 98, 85 A. L. R. 145 (1900). But tearing off a sheet which contains all the other dispositions, leaving only the residuary clause on the second sheet, works a total revocation, *Henry v. Fraser*, 29 Fed. (2d) 633 (D. C., 1928).

²⁸ *Bescher's Estate*, 229 N. Y. S. 821 (Sup., 1928) (Partial revocation inadmissible save when the contents of the removed part cannot be proved); *Clarke v. Scripps*, 2 Rob. 563 (Eccl., 1852) (testator seems to have torn off more than he intended to and then reannexed it). In England, however, it has been held, in *Treloar v. Lean*, 14 P. D. 49 (1889), and *Leonard v. Leonard* (1902), P. 243, that the removal of three of five sheets and the substitution of three others revoked the entire will. See I Jarman on Wills (7th ed., 1930), p. 131.

some part of the script which affects the physical integrity of the instrument is sufficient.²⁹

The English Act declaring a will is not revoked in any part save where the original provisions *are not apparent* applies only to obliterations (including the pasting of an obstruction over the writing), interlineations or other alterations and so applies to erasures where the original can still be read with mechanical aids, but does not apply to burning nor to the form of tearing where an entire portion of the substratum is removed. If the erased portion is legible by means of a glass, it is "apparent".³⁰ Where an obstruction is pasted over words of the will it is not the function of the court to render the words so obscured "apparent" by removing the obstruction,³¹ unless the court conceives that the problem is one not of absolute but of dependent relative revocation, in which latter case the obstruction may be removed to secure evidence of the original provision.³² In this country, where section xxi of the English Act has not been adopted, the erasure need not make the words illegible to show the intent to revoke.³³

There are at least two sorts of interlineations, or rather there may be two different purposes which testators may desire to accomplish by interlineations: (a) they may desire to fill in actual blanks left when the will was drawn, or inadvertent omissions in the expression, or (b) they may wish to alter or add to a will already completed. In the former case it is the common view, both here and in England, that the addition is

²⁹ *White v. Casten*, 46 N. C. 197 (1853) (Signed at top, bottom and in the creases where it was folded); *Johnson v. Brailsford*, 11 S. C. L. 272 (1820); *Bibb v. Thomas*, 2 W. Bl. 1043 (K. B., 1775). Singeing the envelope is insufficient, *Doe v. Harris*, 6 A. & E. 209 (K. B., 1837).

³⁰ *Goods of McCabe*, L. R. 3 P. & D. 94 (1873); *Goods of Braisier* (1898), P. 36, or by a peculiar arrangement of the light, *In re Shelton's Will*, *supra*, n. 18; I Jarman 147.

³¹ *Goods of Horsford*, L. R. 3 P. & D. 211 (1874); *Ffinch v. Coombe* (1894), P. 191.

³² *Goods of Horsford*, *supra*, n. 31.

³³ *Woodfill v. Patton*, *supra*, n. 1 (Erasures and cancellations are mutilations); *Bigelow v. Gillott*, 123 Mass. 102 (1877). In Pennsylvania it seems that an erasure is ineffective when not proved to have been done at the direction of testator by more than one witness and the entire will fails if the original cannot be proved. *Simrell's Estate*, 154 Pa. 604, 26 A. 599 (1893).

presumed to have been made prior to execution.³⁴ On the other hand, interlineations made to alter a completed expression of will are presumed to have been made after execution.³⁵

THE EFFECT OF REVOCATION OF THE WILL OR CODICIL INTER SE

The relationship between a will and its codicils is often tested by a revocatory act done to either will or codicil and the question is what effect does the act to the one instrument have upon the other. The result is, to some extent, affected by the further question whether or not they are executed as separate papers. It is agreed that the revocation of a separate codicil does not revoke the will,³⁶ even though the will may have been revived by the codicil and thus have depended upon it for any effect which it has.³⁷ But the will stands as modified by the revoked codicil, that is (at least in jurisdictions where a will is not revived by the revocation of the revoking will) the removal

³⁴*Martin v. Martin*, 334 Ill. 115, 165 N. E. 644 (1929); *Mundy v. Mundy*, 15 N. J. Eq. 290 (1858); *Smith v. Runkle*, 97 A. 296 (N. J. Prerog., 1915), Woerner, Sec. 49; *Crossman v. Crossman*, 95 N. Y. 145 (1884) (interlineation to make one an exact duplicate of the other); *Guerin v. Hunt*, 118 S. C. 32, 110 S. E. 71 (1921); *Kell v. Charmer*, 23 Bea. 195 (Rolls Ct., 1856); 1 Jarman 144; *Triplett v. Triplett*, 161 Va. 906, 172 S. E. 162 (1934), is confusing. The court observes that there is no presumption either way as to the time when interlineations are made and so the burden of proof falls upon the one who asserts that they were made prior to execution. The court makes no distinction between the two different uses of interlineations, one at least being made to fill a blank, and others to make additions and corrections. The use of a different colored ink from that in the original is properly used as the basis of an inference that the corrections were made subsequent to execution.

³⁵ See preceding note and *Wells v. Wells*, 20 Ky. 152 (1826); *Quinn v. Quinn*, 1 Thomp. & C. 437 (N. Y., 1873); *Dyer v. Erving*, 2 Dem. 160 (Sur. N. Y., 1884); *Stevens' Will*, 3 N. Y. S. 131 (Sur., 1888); *Carver's Will*, 23 N. Y. S. 753 (Sur., 1893); *Lushington v. Onslow*, 6 N. of C. 183 (Ch., 1848); *Doherty v. Dwyer*, 25 L. R. Ir. 297 (Eq. 1890). But see *Succession of Guiraud*, 164 La. 620, 114 So. 489 (1927); *Perrot v. Perrot*, 14 East. 23 (K. B., 1811); *Smith's Estate*, 2 Pa. Co. Ct. Rep. 626 (1887). Proof that interlineations of the second type were made prior to execution by oral evidence was allowed in *Mundy v. Mundy*, *supra*, n. 34, and *Ackerman's Will*, 114 N. Y. S. 197 (App. D., 1908); *City National Bank v. Slocum*, 272 Fed. 11 (C. C. A., 1921). A properly executed interlineation may amount to a codicil, *Smith's Estate*, *supra*.

³⁶*Giddings v. Giddings*, 65 Conn. 149, 32 A. 334 (1894); Page on Wills (2d ed., 1926), Sec. 416. See also *Malone v. Hobbs*, 40 Va. 346 (1842) (leading American case).

³⁷*Cable's Will*, 206 N. Y. S. 501 (1924); *James v. Shrimpton*, L. R. 1 P. D. 431 (1876).

of the codicil does not revive provisions in the will revoked by the codicil.³⁸

In *Black v. Jobling*,³⁹ Lord Penzance gave a historical sketch of the relationship of codicils to the wills of which they were a part and examined the question of the revocation of the codicil by the mere revocation of the will. He showed that under the Statute of Frauds (no devise nor any clause thereof shall be revocable save by . . .) the courts had reached no final conclusion as to the matter, though generally there was a *prima facie* presumption of revocation.⁴⁰ Under the Wills Act (no will or codicil or any part shall be revoked), such implied revocations were clearly eliminated.⁴¹ Lord Penzance also held the codicil was not revoked by revocation of the will, if executed separately, even though apart from the will it became unintelligible.⁴² This is a sound view and the instrument should be probated and left to a court of construction. However, it has been said in England that a plea that testator in revoking his will intended to revoke the codicils (executed separately from the will) was good.⁴³ In Pennsylvania a codicil is presumably revoked by the revocation of the will, but evidence to the contrary is admissible. Thus, in *Pepper's Estate*,⁴⁴ the codicil appointed an executor only, but he had predeceased the testator. The will, if not republished by the codicil was invalid and the conclusion reached was that the codicil fell with the will. This result seems unjustifiable,⁴⁵ and to conflict with the statute.

³⁸ *Osburn v. Rochester Trust Co.*, 46 L. N. S. 983 (1913); *Cable's Will*, *supra*, n. 37. See 40 Harv. L. Rev. 71, 79-82 (1925); Ann. Cas. 1912 A 834; same, 1913 E; *ib.* 1915 A 102, note; 46 L. R. A. (ns) 983, note; 38 A. L. R. 245-6, note; *Mundy v. Mundy*, *supra*, n. 34.

³⁹ *Black v. Jobling*, L. R. 1 P. & D. 685 (1869).

⁴⁰ *Medlycott v. Assheton*, 2 Add. 229, 162 Rep. 278 (Eccl., 1824) But there are cases where it is so independent and unconnected that it may stand alone. So here in *Taggart v. Hooper*, 1 Curt. 289 (Eccl., 1836), and in *Barrow v. Barrow*, 2 Phill. 335, 161 Eng. Reprint 360 (Eccl., 1756) (a separate codicil making independent provisions not revoked).

⁴¹ *Clogstown v. Walcott*, 5 N. C. 623 (V. Ch., 1843); *Grimwood v. Gozens*, 2 Sw. & Tr. 364 (Eccl., 1859); *Goods of Savage*, L. R. 2 P & D. 78 (1870); *Gardiner v. Courthope*, L. R. 12 P. D. 14 (1886); *Paige v. Brooks*, 75 L. T. N. S. 455 (1896). See 1 Jarman 141-2; 1 Page, Sec. 415.

⁴² *Goods of Turner*, L & R. 2 P. & D. 403 (1872).

⁴³ *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154, 205-6 (1876).

⁴⁴ *Pepper's Estate*, 148 Pa. St. 5, 23 A. 1039 (1892).

⁴⁵ Where the codicil is in effect a new will, however, it does not perish with the earlier will, *Smith's Estate*, *supra*, n. 35.

The American cases, apart from those in Pennsylvania, follow in general the rule of *Black v. Jobling*.

There remains the case where will and codicil are part of the same document, the latter being executed at the foot of the will or on the margin. The great weight of authority regards such a will and codicil as a single instrument, so that the revocation of one revokes the other also,⁴⁶ or if one stands while the other is revoked, a partial revocation of the entire instrument occurs.

It seems wise to regard wills and codicils as separate instruments when executed separately and as a single instrument save as to the date of execution when the codicil appears on the margin or at the foot of a will. Thus, a separate codicil is never revoked save by appropriate act to itself. Whether due to its dependence on the wording of the revoked will, it can have independent significance is a matter of construction, and that is not of primary interest to the probate court. Some states have provided by legislation that a codicil shall in all cases be revoked when the will is revoked.⁴⁷ But such legislation is on the whole undesirable, first because there is no sufficient reason to suppose that testator meant to revoke a separate codicil by revoking his will unless he so declares in the appropriate manner; next because an instrument may be called by the testator a codicil, which is in no proper sense a codicil, but is rather a later will,⁴⁸ and an instrument may be called a will which is

⁴⁶ *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976 (1913) (signature to codicil on fourth page of will cut out. Parol evidence showed testator intended to revoke entire will); *Youse v. Forman*, 68 Ky. 337 (1869) (codicil on margin depending on the will for interpretation revoked by revoking the will); *Re Brookman*, 33 N. Y. S. 575 (Sur., 1895); A. C. 1915 A 102, note; 38 A. L. R. 244, note; *Francis' Will*, 132 N. Y. S. 695 (Sur., 1911) (codicil under same cover as will); *Christmas v. Whinyates*, 3 Sw. & Tr. 81 (Ecc., 1863) (Will and codicil one instrument but nature of tearing showed intent to revoke partially); *Goods of Bleckley*, L. R. 8 P. & D. 169 (1883). A codicil on the back of a will was not recorded where contrary intention shown; *Goods of Harris*, 3 Sw. & Tr. 485 (Ecc. 1864).

⁴⁷ See Deering's Probate Code of California (1931), Sec. 79; Idaho Code Annotated (1932), Sec. 14-318; Compiled Laws of North Dakota (1913), Sec. 5673; Oklahoma Statutes (1931), Sec. 1568; Rev. St. of Utah (1933), Sec. 101-1-30.

⁴⁸ *Smith's Estate*, *supra*, n. 35; *Bingaman's Estate*, 281 Pa. 497, 127 A. 73 (1924); *Osborn v. Rochester Deposit Co.*, 209 N. Y. 54, 102 N. E. 571 (1912); for codicils called wills see *Gelbke v. Gelbke*, 88 Ala. 427, 6 So. 834 (1889); *Grubb's Estate*, 174 Pa. 187, 34 A. 573 (1896); *Owens v. Fahrenstock*, 110 S. C. 130, 96 S. E. 557 (1918); *Collins v. Ellstone* (1893). P. 1. Cf. *Goods of Bonner*, L. R. 21 Ir. R. 339 (Ch. & P. D., 1888).

merely a codicil. Would either of these be revoked under the statute? Such a statute puts a court in a quandary in these cases and on the whole creates more uncertainty than certainty.

DUPLICATES

The practice of retaining a copy of an instrument at the time of executing it has been carried over into the drafting of wills. A mere copy is thus evidence of the contents of the original, but an executed copy is itself an original. A carbon copy is an exact duplicate. Where there are duplicate wills in *suo manu*, the order of attesting may vary between the two, or there may be a different set of attestors. If one bears a date different from that of the other, they are not duplicates in fact and the earlier one is revoked by the later one to the extent that they are not wholly consistent and the earlier one becomes inoperative to the extent that they are alike.⁴⁹ A duplicate, whether it be exact or not, should make precisely the same disposition and have precisely the same effect, or it is by hypothesis not a duplicate,⁵⁰ the *alter ego* of its fellow. If one is a carbon, perhaps it might be called a copy rather than an original, but the question which is original and which the copy should be wholly unimportant if the two are in fact or effect duplicates, and both are executed. Two wills of the same date, both being executed, are not necessarily duplicates, and if they differ, both should be probated.⁵¹ To the extent that they conflict, there will be no will unless evidence is forthcoming to indicate which is later in time and neither will be effective in such case save as it is in harmony with the other.⁵² Two wills, however, may bear the same date, and one may be in effect a codicil to the other.⁵³

⁴⁹ *O'Neill v. Farr*, 1 Rich. L. 80 (S. C., 1844) (dictum), but see *Doe v. Strickland*, 8 Com. B. 724 (1849), where jury found that later will was intended as a duplicate and so as part of the earlier will and was revoked to the extent that the earlier one had been revoked. And see *Hubbard v. Alexander*, L. R. 3 Ch. D. 738 (1876).

⁵⁰ *St. Mary's v. Masterson*, 122 S. W. 587 (Tex. Civ. App., 1909) (Some variation between wills executed same day and each contained a revocatory clause. Intrinsic evidence showed which was later and the earlier one was held revoked).

⁵¹ *Cousinery's Estate*, 13 Pa. Dist. R. 224 (1904).

⁵² *St. Mary's Orphan Asylum v. Masterson*, *supra*, n. 50. See 22 Ky. Law Jour. 469, 479 (1934).

⁵³ *Goods of Bonner*, *supra*, n. 48 (First will appointed executors; second one disposed of property); *Grubb's Estate*, *supra*, n. 48. (Three

Where wills are exact duplicates, it is believed that only one should be probated because only one should have effect.⁵⁴ Thus, all question of cumulation is avoided,⁵⁵ because they are duplicates, but if they are of the same date and differ from each other, both must be proved.⁵⁶ There may arise in such case the possibility of cumulation, for when a general legacy is given by one instrument and the same amount is given by another instrument in the absence of a contrary intent, the provisions are cumulative.⁵⁷

Where one of the duplicates is in the hands of the testator and the other in the custody of another, such as testator's bank or his attorney, and the one in his possession is revoked, presumably both are revoked.⁵⁸ But the presumption is rebuttable by evidence, the testator's declarations being sufficient for that purpose,⁵⁹ and the question of intent should be left to the

wills of same date, first gave certain property to A; second gave the remainder to B and C; and third declared that the husband should have nothing.)

⁵⁴ *Crossman v. Crossman*, *supra*, n. 34 (an interlineation of a forgotten item to make it like the other); In *Furber's Estate*, 22 Pa. Dist. R. 987, see 67 Pa. L. Rev. 195 (1913), both copies were required to be probated, but the precedents followed were not applicable, since they dealt with wills executed at same time but entirely different in content, in which event all are to be probated and construed.

⁵⁵ *Hubbard v. Alexander*, *supra*, n. 49.

⁵⁶ *Crossman v. Crossman*, *supra*, n. 34; *Re Forman's Will*, 54 Barb. 274 (N. Y., 1869) (Two wills same date in some respects repugnant to each other, must both be probated).

⁵⁷ *Hubbard v. Alexander*, *supra*, n. 49.

⁵⁸ *Walsh's Estate*, 196 Mich. 42, 163 N. W. 70, A. C. 1918 E 217 (1917); *Schofield's Will*, 129 N. Y. S. 190 (Sur., 1911); *McChesney's Will*, 194 N. Y. S. 893 (1922); *Pattison's Will*, 140 N. Y. S. 478 (1912); *Pemberton v. Pemberton*, 13 Ves. 290 (1805) (see note in 48 A. L. R. 297), and see *O'Neill v. Farr*, *supra*, n. 49, and 22 Col. L. Rev. 684 (1922).

⁵⁹ *Pattison's Will*, *supra*, n. 58. The declarations of the testator are generally admissible in evidence to prove whether certain acts to the document were or were not intended to be revocatory. *Steele v. Price*, 44 Ky. 58 (1845); *Sanders v. Babbitt*, 106 Ky. 646, 51 S. W. 163 (1889); *Stuart v. McWhorter*, 238 Ky. 82 (1931). Court expressly disagrees with the contrary view expressed in *Throckmorton v. Holt*, 180 U. S. 552 (1900). See *Managle v. Parker*, 75 N. H. 139, 71 A. 637 (1908), A. C. 1912; *Re Kennedy*, 167 N. Y. 163, 60 N. E. 442 (1901); *Drury's Will*, 22 N. B. R. 313 (Can., 1882). See further references and notes in 10 Ann. Cas. 535 and citations also to a small minority of cases taking the view that these declarations are not admissible. See also I Page on Wills, Secs. 779, 780; I Williams on Executors (12th ed., 1930), p. 96. *Skipwith v. Cabell*, 19 Gratt. 758, 787 (1870); *U. S. Guaranty Co. v. Carter*, 134 Ky. 374, 120 S. W. 328 (1909); *Harris v. Davis*, 1 Coll. 416 (V. C., 1844); *Re Hopkins*, 172 N. Y. 360, 65 N. E. 173 (1902); *Smith v. Hunkle*, 97 A. 296 (N. J. Prerog., 1915); *Woerner*, Sec. 49; *Black v. Jobling*, *supra*, n. 39; *Paige v. Brooks*, 75

jury.⁶⁰ If the testator has both copies and preserves one, there is presumably no revocation.⁶¹

It does not seem a desirable practice to execute duplicates. The preservation of a carbon copy by the draftsman to establish the contents in the event that the will should be lost (where there was no revocatory intent) is well enough, but a duplicate gives rise to problems which unnecessarily complicate the matter, and makes the outcome difficult to predict under the varying circumstances that may possibly arise. Thus, testator may well fail to preserve carefully his own duplicate, because he knows there is another in the attorney's files, and he may destroy one of the two in his possession, forgetting that he has another, or believing that the destruction of one is sufficient as a complete revocation.

2. THE CONCURRENCE OF ACTS AND INTENT

It is usually held that the act to the document must be caused by the testator and in his presence and done with intent to revoke in order to constitute a revocation.⁶² In fact, the whole doctrine of dependent relative revocation has been built

L. T. N. S. 455 (1896); 3 Wigmore on Evidence, Sec. 1737, favoring such admission as evidence of a state of mind.

But declarations of the testator as to the contents of lost wills are more generally not admitted (In *re Kent's Will*, 155 N. Y. S. 894 (App. D., 1915); *quaere* as to the rule in England, *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154, 205-6 (1876); *Woodward v. Gaulstone*, L. R. 11 App. C. 469 (1886); and *Williams*, op. cit. and 3 Wigmore, Sec. 1736, dealing with them as hearsay and suggesting here a possible exception to the hearsay rule. With respect to duplicates, where the one in the possession of the testator only has been lost, proof of testatrix' declarations that her will was in another place (where duplicates were) was admitted to show that there was no intent to revoke, *Pattison's Will*, *supra*, n. 58, but it has also been held that if both duplicates were in testator's possession and one only was preserved, evidence of testator's declaration that he intended to revoke the entire will was inadmissible. *Atkinson v. Morris* (1897), P. 40; *Hubbard v. Alexander*, *supra*, n. 49 (holding that declarations of testator may be used to establish that certain two wills are duplicates in a court of construction), is said by Jarman [I Jarman, p. 470, n. (k)] to be obviously erroneous. That is, the probate court must pass upon the issue whether instruments are duplicates, over which issue a court of construction has no original jurisdiction.

⁶⁰ *Managle v. Parker*, *supra*, n. 59.

⁶¹ See I Jarman on Wills, pp. 132-4.

⁶² *Shield's Will*, 190 N. Y. S. 562 (Sur., 1921); *Atkinson v. Morris*, *supra*, n. 59 (Duplicate preserved is not revoked, as a rule of law, though testator intended a revocation of both). See also *Roberts v. Round*, 3 Hagg. 548; 162 Reprint 1258 (Eccl., 1830). But cf. *Doe v. Strickland*, *supra*, n. 49. See 35 Harv. L. Rev. 626, note (1922).

upon that footing.⁶³ Thus, where testator's wife destroyed the will without authority, the act could not be ratified by him.⁶⁴ Some American courts, while admitting that an act unaccompanied by intent to revoke, is ineffective, still take the view that an act destructive of the physical integrity of the instrument, done without knowledge or consent of the testator may be ratified by him. It is assumed that he ratifies the act and thus impliedly revokes the will if he has knowledge and an opportunity to correct or repair the results of the act or event and does not do so. Thus, after a will had been mutilated by vermin, it was held that testator might accept the act as his own as a revocation.⁶⁵ So a will lost to the knowledge of testator has been held revoked,⁶⁶ because the court infers a revocation by destructive act of the testator. In Wisconsin it was held that a will inadvertently destroyed by fire to the knowledge of the testator was revoked. The testator was said to have intended to die intestate because he did not seize upon the opportunity of executing another.⁶⁷ This result cannot be reached, it seems, without overthrowing the rule that *animus* must accompany the act. Professor Page points out⁶⁸ that a problem different from revocation may arise where the requirements of statutory proof of a lost will prevent the establishment of an unrevoked will.

3. PARTIAL REVOCATION

Both the Statute of Frauds and the Wills Act, in providing for the methods of revocation of a will include "or any clause thereof". Thirty-three American states have similar language

⁶³ I Page on Wills, Sec. 419. Consent must be given while he is *compos mentis*, *Allison v. Allison*, 37 Ky. 90 (1838).

⁶⁴ *Gill v. Gill* (1909), P. 157. See also *Miles v. Millward*, 15 P. D. 20 (1889) (Will destroyed without testator's consent and she refused to execute another—no revocation); *Margary v. Robinson*, 12 P. D. 8 (1886) (Erasure by the attestors of their signatures without the consent of the testator); *Estate of Patterson*, 155 Cal. 626, 102 P. 941, 26 L. R. A. (N. S.) 654 (1909) (will destroyed in earthquake without knowledge of testator, not revoked). See Deering, Probate Code of California, Sec. 380 (1931), and see *Olmstead's Estate*, 122 Cal. 224, 54 P. 745 (1898); *Barnes v. Brownlee*, 97 Kan. 517, 155 P. 962 (1916).

⁶⁵ *Culter v. Culter*, 130 N. C. 1, 40 S. E. 689 (1902). See I Page on Wills (2nd ed., 1926), Secs. 425 and 635.

⁶⁶ *Deaves' Appeal*, 140 Pa. St. 242, 21 A. 395 (1891); *Campbell v. Cavanaugh*, 96 N. J. Eq. 724, 125 A. 569 (1923).

⁶⁷ *Parson v. Balson*, 129 Wis. 311, 109 N. W. 136 (1906). Contra, *re Booth* (1926), Prob. 118.

⁶⁸ *Op. cit.*, Secs. 425 and 635; 22 Ky. L. Jour. 469, 497-8 (1934).

and it is commonly assumed that the addition of this phrase contemplates the possibility of partial revocation. New York alone, of these states⁶⁹ which have such a clause, denies effect to an act of partial revocation.⁷⁰ Of the remaining fifteen states, three have emphatically declared against it.⁷¹ It is insisted that the absence of such a phrase means something. Some of these fifteen have affirmed the possibility of partial revocation.⁷²

No state permits partial revocation where it results in a change of construction of what remains or increases a provision for another.⁷³ In that respect partial revocation is similar to striking out words of a will written by mistake. There is a conflict whether partial revocation may increase the residuary clause. The argument favoring partial revocation, even though that which falls into the residuary clause is thereby increased, is supported by analogies: (a) lapsed provisions; (b) gifts to persons dead when the will is executed; (c) provisions that

⁶⁹ See 14 Ia. L. Rev. 290 (1929).

⁷⁰ *Lovell v. Quitman*, 88 N. Y. 377 (1882). The statute declares in the first clause that no will . . . "nor any part thereof" shall be revoked otherwise than by some writing, etc., or unless such will (statute here omits "or any part thereof"), be burnt, etc. Court says that the phrase does not carry over to the second clause. In *Simrell's Estate*, 154 Pa. 604, 26 A. 599 (1893), it seems that Pennsylvania did not permit an erasure of a part to be effective, but it is not a decision against partial revocation. The states whose statutes contain this phrase as given by Bordwell in the Iowa Law Review are: Arizona, Arkansas (*Jeffett v. Cook*, *supra*, n. 4), California (*Wikman's Estate*, *supra*, n. 14), Delaware, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland [*Home v. Bantz*, 107 Md. 543, 69 A. 376 (1908)], Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey [*Kirkpatrick's Will*, 22 N. J. Eq. 463 (1871)], New York, North Carolina, North Dakota, Oklahoma [*In re Cabler's Estate*, 124 Okla. 275, 257 P. 757 (1927)], Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas [*Schnable v. Henderson*, 152 S. W. 231 (Tex. C. A. 1912)], Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming. The states, consequently, which omit this phrase from their statutes are: Alabama [*Law v. Law*, 83 Ala. 432, 3 So. 752 (1888)], Colorado, Connecticut, Georgia [*Hartz v. Sobel*, 136 Ga. 565, 71 S. E. 995 (1911)], Illinois, Kansas, Massachusetts, Maine, Minnesota, Nevada, New Mexico, Ohio, Oregon, Tennessee, Vermont, and also the District of Columbia.

⁷¹ *Law v. Law* and *Hartz v. Sobel*, *supra*, n. 70; *Coghlin v. Coghlin*, 79 Oh. St. 71, 85 N. E. 1058 (1908).

⁷² *Miles' Appeal*, 68 Conn. 237, 36 A. 39 (1896) (dictum); *Bigelow v. Gillett*, *supra*, n. 33; *Penniman's Will*, 20 Minn. 245 (1874) (inference).

⁷³ *Eschbach v. Collins*, 61 Md. 478 (1884); *Home v. Bantz*, *supra*, n. 70; *Safe Deposit Co. v. Thom*, *supra*, n. 25; *Pringle v. McPherson*, 2 Brev. 279 (S. C., 1809), but cf. *Swinton v. Bailey*, 4 App. Cas. 70 (1878).

fail because of their illegality;⁷⁴ (d) provisions too indefinite to have effect;⁷⁵ (e) cases of disclaimer; and (f) gifts made in the will and revoked by codicil without further disposition of them.⁷⁶ The residuary clause is a testamentary device designed to catch everything not otherwise disposed of and the increase in it arising from partial revocation by act to the instrument can no more be properly said to be lacking sufficient execution than any other provision which at the time of execution it potentially contains.⁷⁷ There has never been any doubt about the possibility of partial revocation under the English statutes,⁷⁸ and the residuary clause may thus be increased.⁷⁹

Provisions may be made in three situations: (a) a gift is provided for one beneficiary and is revoked; (b) provision is made for two or more joint beneficiaries and the name of one is stricken; (c) a legacy or devise is made to tenants in common and the name of one is eliminated.

The first affects only the residuary clause. In the second, revocation has the same effect as a lapse and the gift goes to the

⁷⁴ *Cruikshank v. Home*, 113 N. Y. 337, 21 N. E. 64 (1889).

⁷⁵ *Re Bonnet*, 113 N. Y. 522, 21 N. E. 139 (1889).

⁷⁶ *Giddings v. Giddings*, 65 Conn. 149, 32 A. 334 (1894).

⁷⁷ *Bigelow v. Gillott*, *supra*, n. 33 (leading case); *Collard v. Collard*, 67 A. 190 (N. J. Prerog., 1907) (Entire estate to wife for life or until she remarries, remainder over. Wife's name erased and all goes over); *Brown v. Brown*, 91 S. C. 101, 74 S. E. 135 (1912) (erasure of five legacies, but the original was still legible); *Home v. Bantz*, *supra*, n. 70; *In re Kent's Will*, 155 N. Y. S. 894 (App. D., 1915); *Barfield v. Carr*, 169 N. C. 574, 86 N. E. 498 (1915) (Residue divided among numerous beneficiaries and several of them were canceled. These canceled continue in the residuary clause by virtue of statutory provision). Contra, *Miles' Appeal*, *supra*, n. 72; *Knapen's Will*, *infra*, n. 122 (inferentially). By statute in Kentucky, the revoked provision, though not otherwise disposed of, does not go into the residuary clause, *Carroll's Ky. Statutes* (1930), Secs. 4843 and 2064.

⁷⁸ *Goods of Cooke*, 5 Notes of C. 390 (Ecc., 1847); *Clarke v. Scripps*, *supra*, n. 28; *Goods of Woodward*, L. R. 2 P. & D. 206 (1871).

⁷⁹ *Larkins v. Larkins*, 3 B. & P. 16 (C. P., 1802). In addition to revoking a devise, there was also a revocation of the devise to one of the two joint tenants named in the residuary devise. It was held that the other would take the entire devise and that there was no increase in the interest thus coming to a joint tenant. See also *Short v. Smith*, 4 East. 419 (K. B., 1803) (appointment of one of two executors revoked); *Re Fleetwood*, 15 Ch. D. 594 (1880) (one of two joint beneficiaries attests, the other takes entire gift); 23 Harv. L. Rev. 558 (1910); 6 Mich. L. Rev. 272 (1908); 14 ib. 520 (1916); Ann. Cas. 1912 D 174; 38 L. R. A. (ns) 798, note 2; Williams (11th ed., 1921), p. 965. In *Mason v. Methodist Church*, 27 N. J. Eq. 47 (1876), a legacy to four persons as tenants in common was made and by codicil the share of one was revoked. The others held not to take the entire gift. But see *re Radcliffe*, 51 W. R. 409 (Eng., 1903), and I Jarman, p. 157,

survivors, under the rule that the gift is *per tout et per my*. In the latter case the elimination of one should have no effect on the others, and the result should be the same as in the case of a lapse. Where partial revocation is not permitted, evidence is sought as to the identity of the person eliminated, but if it were not forthcoming there would be no total revocation. The courses open to the court in the case of (c) are either to give the whole bequest to the remaining beneficiaries or to give them only what they originally were to receive, to regard the entire provision as revoked, or to disregard the revocation. It is arguable that the revocation should be disregarded because testator ineffectively inserted the name of another or because he meant a thing he could not accomplish, viz., to increase the provisions for the others, and courts might be tempted, therefore, to apply the doctrine of dependent relative revocation. Clearly the course should be followed of permitting the remaining beneficiaries to take what the will gives them, where partial revocation is possible, and let the revoked share fall into the residue.

Where the statute is construed as forbidding partial revocation, the court in such a state may be in a quandary where there is no intent to revoke the entire will, and the part which testator attempted to revoke cannot be proved. This situation becomes not unlike that under the English Wills Act, which declares:⁸⁰

"That no obliteration, interlineation, or other alteration . . . shall have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed as hereinbefore is required for the execution of a will."

There is this difference, however, that under the no partial revocation rule, proof of the contents of the destroyed or obliterated part may be sought from the best evidence available, and partial revocation may be thus avoided,⁸¹ while no such proof would be admissible under the English statute.⁸²

⁸⁰ St. 7 W. IV and I Vict. Ch. 26, Sec. XXI (1837).

⁸¹ In *re Prescott*, 4 Redf. 178 (Sur. N. Y.), but this does not include declarations of testator. See In *re Kent's Will*, 155 N. Y. S. 894 (App. D., 1915); *Lang's Will*, 30 N. Y. S. 388 (1894); *Kissam's Will*, 110 N. Y. S. 158 (Sur., 1908) (the erased provision could still be read); *Westbrook's Will*, 89 N. Y. S. 862 (Sur., 1904) (part had been cut out and pasted in again); In *re Crawford's Will*, 142 N. Y. S. 1032 (N. Y., 1913) (extensive alterations but original still legible). See also *Hartz v. Sobel*, *supra*, n. 70.

⁸² *Goods of Horsford*, *supra*, n. 31. According to Bordwell, 14.

The question whether the act to the document was intended as a total or a partial revocation (in states where partial revocation is permissible) is determined by the present condition of the document, the part obliterated or removed, and its relation to what remains, and the oral declarations made at the time of the act.⁸³ The fact of the preservation of a will in its mutilated condition is regarded as significant.⁸⁴

Courts which deny the possibility of partial revocation under the Statute still admit the necessity of it. Thus, if the contents of what is removed cannot be established, the court is obliged to probate what remains (partial revocation) or hold that there is a total revocation.⁸⁵ The problem is similar even where partial revocation is permissible.⁸⁶ Where there has been a revocation of an integral legacy, specific or pecuniary, such unknown provision must usually fall into the residue. But if in the residuary clause there is a partial revocation of a provision for a fixed proportion to an integral legatee, this portion will pass undisposed of by will.⁸⁷

4. DEPENDENT RELATIVE REVOCATION

The writer very largely agrees with the excellent article of Professor Warren hereafter cited, in which he shows that the term dependent relative revocation, while not inherently devoid of meaning, yet is a confusion of two concepts, conditional revocation and revocation under a mistake. The ques-

Ia. L. Rev. 289, there has been little tendency in the United States to adopt Section 22 of the English Act to provide for the attestation of cancellations and Iowa only is similar.

⁸³ *Leonard v. Leonard* (1902), P. 243; 1 Page, Sec. 420; *Clarke v. Scripps*, *supra*, n. 28; *Overall v. Overall*, 16 Ky. 50 (1821); *Brown's Will*, 40 Ky. 56 (1840); *Wells v. Wells*, 20 Ky. 152 (1826).

⁸⁴ *Russell v. Tyler*, 224 Ky. 511, 6 S. W. (2d) 707 (1928); *Goods of Woodward*, L. R. 2 P. & D. 206 (1871) (Declarations of testator made at the time of the act are admissible).

⁸⁵ *Henry v. Fraser*, 29 Fed. (2d) 633 (App. D. C., 1928) (will on two sheets, second one containing the residuary clause only. The first was removed. Held, entire revocation); *Gugel v. Vallmer*, 1 Dem. 484 (N. Y. Sur., 1883) (four of six pages removed. It is a question for the jury whether entire revocation was intended); *In re Curtis Will*, 119 N. Y. S. 1004 (App. D., 1909) (details of a provision for F were torn off. Contents unknown; no interlineations. Probate it as it stands); *Bescher's Estate*, 229 N. Y. S. 821 (Sup. Ct., 1928) (same result. One sheet removed, contents could not be proved).

⁸⁶ *Townsend v. Howard*, 86 Me. 285, 29 A. 1077 (1894) (Erasure amounted to a total revocation); *Leonard v. Leonard*, *supra*, n. 83 (2 of 5 sheets removed caused a total revocation).

⁸⁷ *In re Kent's Will*, *supra*, n. 59.

tion arises, can further simplification of that confused concept be made?

a. Situations to be Distinguished from Dependent Relative Revocation

With respect to revocation by physical act to the document, certain distinctions should be drawn at the outset, before the remaining situations to which dependent relative revocation is applicable can be ascertained.

Thus, it is not to be confused with (a) *revival of a revoked will*,⁸⁸ since revival implies no absolute revocation at all but a mere temporary displacement or suspension and a reinstatement of the affected writing.⁸⁹ The English and many American statutes forbid revival save by codicil or by reexecution.⁹⁰ It should not include (b) *revocation caused by mistake of motive* (mistake in the inducement) where no act creating a substitute has been as yet performed, though one may be contemplated in the indefinite future.⁹¹ The English cases hold that a will destroyed because it was thought to be invalid or useless is not revoked.⁹² Indeed, such cases are classed by Jarman with in-

⁸⁸ In *Goodright d. Glazier v. Glazier*, 4 Burr. 2512, 98 Eng. Rep. 317 (K. B., 1770), Lord Mansfield indicated that if the testator had destroyed the prior will, or if the later one had contained a revocatory clause, the former will would have been revoked (testator could not have intended to revive a destroyed will); *Burtenshaw v. Gilbert*, Cowper, 49, 98 Eng. Rep. 961 (1774) (Opinion by Mansfield. Where the later cancelled will contained a revoking clause and the former cancelled but not destroyed, will was not revived).

⁸⁹ But see Cornish, *Dependent Relative Revocation*, 5 So. Cal. L. Rev. 273, 393 (1931); *Dickinson v. Swartman*, 4 Sw. & Tr. 205 (Eccl., 1860) (where the problem was regarded as one of revival, but the decision was later overruled).

⁹⁰ (A question of dependent relative revocation may arise, however, where the revocation has for its object the revival of a prior will which the testator mistakenly assumes to be possible.)

⁹¹ *Frothingham's Will*, *supra*, n. 13; *Bethell v. Moore*, 19 N. C. 311 (1837) (It is a jury question).

⁹² I Jarman, p. 133; *Perrot v. Perrot*, 14 East. 23 (K. B., 1811) (appointment by deed. Name cut from deed because the power was erroneously believed to be exercised by a later will); *Beardsley v. Lacey*, 78 L. T. N. S. 25 (1897) (will believed useless); *Giles v. Warren*, L. R. 2 P. & D. 401 (1872) (will torn up because testator had been told it was invalid. He later pieced the parts together); *Stamford v. White* (1901), P. 46 (testator erroneously believed that the purposes of the will would be accomplished by a prior settlement); *Goods of Thornton*, 14 P. D. 82 (1889) (testator believed same results would accrue by intestacy); *Goods of Moresby*, 1 Hagg. 378, 162 Eng. Rep. 619 (Eccl., 1828) (testator made later nuncupative will mistakenly, believing prior will had been accidentally destroyed).

advertent destruction and with destruction by an insane or drunken testator, though the cases sometimes speak of these acts of revocation as being conditional.⁹³ Jarman distinguishes these from dependent relative revocation and implies that there is no revocation in such cases at all. (c) The rule against *partial revocation* in many states will also account for the numerous decisions in this country.⁹⁴ Sometimes the rule against partial revocation reaches the same result as would dependent relative revocation and relieves the court from invoking the latter doctrine.⁹⁵ Partial revocation is, to a limited extent, possible under the English Wills Act, and if the question be one of partial revocation and the affected part is not *apparent*, it is not thereafter established by other evidence, but if the revocation is dependent, any evidence available is admissible to establish the original of the affected part.⁹⁶ Partial revocation may also fail, not because the act is dependent, but because to allow a revocation would be to increase some other provision (not residuary) of the will.⁹⁷ The only alternatives are to allow the whole will to fail, to reform it, or to probate it as it originally was written. A difficult case may arise where there is no evidence as to what the original provision was and so it may not be known whether the revocation increased some other provision or not. The doctrine may also (d) be regarded as inapplicable in those cases in which the courts declare *that in the absence of some explanation of the origin and significance of a cancellation or alteration, the cancellation or alteration is to be ignored and the will is to be probated as originally executed*.⁹⁸ Finally, (e) the writer believes that it should not be

⁹³ *Re Southerden*, 133 L. T. R. 505 (C. A., 1924).

⁹⁴ See e. g. *Lang's Will*, *supra*, n. 81; *McPherson v. Clark*, 3 Bradf. (N. Y. Sur.) 92 (1854); *Quinn v. Quinn*, 1 Thomp. & C. 437 (N. Y., 1873); and prior discussion on partial revocation.

⁹⁵ *Lang's Will*, *supra*, n. 81.

⁹⁶ *Goods of Horsford*, *supra*, n. 31; *Goods of McCabe*, L. R. 3 P. & D. 94 (1873).

⁹⁷ *Jackson v. Holloway*, 7 Johns 394 (N. Y. c. l. 1811); *McPherson v. Clark*, *supra*, n. 102; *Pringle v. McPherson*, 2 Brev. 279 (S. C., 1809).

⁹⁸ *Means v. Moore*, Harp. 314 (S. C., 1824); *Farris v. Wyatt*, 113 Va. 254, 74 S. E. 189 (1912) (Erasures must be shown to have been made by testator after execution of the will or under circumstances tending to show that he intended a revocation); *City Natl. Bank v. Slocum*, 272 Fed. 11 (C. C. A. 6th, 1929) ("In trust for" was cancelled, presumably by testator but no effect was given to the cancellation, though dependent relative revocation was not suggested. The court questioned the sufficiency of the probate decree in not clearly finding whether or not these words were a part of the will).

applied to the cases where the revocation occurs only by a validly executed subsequent instrument which is inoperative.⁹⁹

b. Revocation by Subsequent Instrument. The Roman Law Rule

So-called dependent relative revocation by *subsequent instrument* has been dealt with elsewhere.¹⁰⁰ It is assumed here that if the subsequent instrument contains a revoking clause, the earlier will is unconditionally revoked. I shall therefore consider those cases where the subsequent instrument is validly executed, contains no revocatory clause, and is inoperative (at least as to those provisions about which the question of revocation arises). As defined by Williams,¹⁰¹ the doctrine of dependent relative revocation is applicable where an act of *destroying*, being done with reference to another act (a substitute by new instrument or by interlineation) meant to be an effectual disposition, will be a revocation or not, according as the relative act is efficacious or not. The revoking act is the dependent act and the proposed new disposition is the relative act.

While this definition is possibly broad enough to include the case where the new disposition also contains the only revocation, still to limit its application to the case where the dependent act is an act to the document seems to conform to the definition much more appropriately. Both Williams and Jarman speak of the revocation as being done by an act of destruction. How can one separate the dependent act, revocation by inconsistent words, from the relative act, the new disposition, if they are a part of the same writing? Professor Warren assumes, however, that the problem is identical whichever of the two methods is employed, and that the application of the doctrine should depend upon intention rather than upon a legal rule.

I have tried to show¹⁰² that it is simpler to disregard the doctrine in the case of revocation by subsequent instrument, at least in most cases. That is to say the will which is allegedly revoked in this fashion is not revoked at all, by a later, con-

⁹⁹ Discussed in 22 Ky. L. Jour. 469, 481-494.

¹⁰⁰ See e. g., Evans in 22 Ky. L. Jour. 469, 490 (1934); Warren in 33 Harv. L. Rev. 337 (1920); Cornish in 5 So. Cal. L. R. 273, 393 (1931).

¹⁰¹ I Williams on Executors (12th ed., 1930), p. 92; I Jarman on Wills (7th ed., 1930), p. 79.

¹⁰² *Supra*, n. 88.

sistent instrument. It merely becomes inoperative in case the later will is effective, but continues operative where the later will, though validly executed, is ineffective because of some rule of law. If the later will is wholly inconsistent, it revokes the prior one just as clearly as it would if it contained a revoking clause, but to the extent that it is consistent, it does not revoke. In cases where the later, ineffective disposition puts qualifications upon the earlier disposition but is essentially similar in other respects, the court is faced with a problem of construction.

Two further points of distinction should be noted between revocation by a subsequent valid but inoperative instrument and revocation by act to the document. (a) There is in the first case a valid, even if ineffective substitute which is never true where the revocation is by act to the document (or if there is, then the question of revival, rather than dependent relative revocation is raised); (b) the rule of the Roman law, "That a prior will is revoked only when the later one is completed," was adopted by the common law lawyers, but applied only in the second situation.¹⁰³ In English law, the Roman law rule, "The earlier will is not revoked until a later one is completed," seems to have had a considerable influence before and at the time the doctrine of dependent relative revocation was being formulated.¹⁰⁴ This Roman law rule was applied (misapplied) in cases where the revocation was by act to the document, and the later will was sufficiently executed to revoke but not to pass property (inasmuch as the Statute of Frauds did not require an attested revocation).¹⁰⁵ It was declared by Weldon, J., in *Drury's Will*¹⁰⁶ that this civil law rule became the rule of the English law applicable where the intent to revoke an earlier will concurred with the further intent to make a new disposi-

¹⁰³ *Limbery v. Mason*, infra, n. 105 (the case came up from the prerogative court and two doctors joined in the final opinion).

¹⁰⁴ Dig. Lib. 28, tit. 3, s. 2. *Tunc prius testamentum rumpitur cum posterius perfectum est*. See also Inst. Lib. 2, tit. 17, *Cautum est ne alias tabulae priores jure factae irritae fiant nisi sequentes jure ordinatae et perfectae fuerint; nam imperfectum testamentum, rumpitur sine dubio nullum est*.

¹⁰⁵ *Limbery v. Mason*, 1 Comyns 451, 92 Eng. Rep. 1155 (1734); *Onions v. Tyrer*, infra, n. 110 *ex parte Ilchester*, 7 Ves. 348, 32 Eng. Rep. 142 (Exch., 1803) (will insufficiently executed, appointment of a testamentary guardian held not to revoke a prior appointment, though sufficiently executed to accomplish that purpose).

¹⁰⁶ *Drury's Will*, supra, n. 59.

tion, and that it made no difference whether the intended alterations were like or unlike the prior allegedly revoked provisions. It is evident that there is no proper occasion for introducing this rule of the Roman law into the common law. The execution of a will by a Roman had as its chief purpose the establishment of a *suus heres* who should continue the personality of the testator, and that purpose finds no place in Anglo-American law.

c. Where New, Though Unexecuted Provisions, Are in Existence

The testator may intend to make new provisions, substitutes for the old, either by the execution of a new will or the revival of an old one, by the removal of one or more pages and the insertion of others, and by interlineations, the latter two methods being frequent when only a partial revocation is desired. In the case of interlineations, it is often held that there is no absolute intent to revoke,¹⁰⁷ and the same result is reached where there is a substitution of pages if the contents of the removed page can be proved.¹⁰⁸ Little consideration in many courts is given to the question whether there is a similarity between the revoked will and the substitute and the erasure of the beneficiary's name and the insertion of that of another (unexecuted) as beneficiary of that legacy. It is frequently held that this does not revoke where the original name can be established.¹⁰⁹ If the invalid substitute is essentially like the

¹⁰⁷ *Penniman's Will*, 20 Minn. 245 (1874) (interlineations present); *Hesterberg v. Clark*, 166 Ill. 241, 46 N. E. 734 (1897); *Hide v. Mason*, 8 Vin. Abr. "Devise", p. 140 (1734) (Interlineations largely changed scheme of dispositions. A new will, following mainly the terms of the interlineations, was found unexecuted. Held, revoked); *Dickinson v. Stidolph*, 11 C. B. (N. S.) 341, 360, 142 Reprint 828, 836 (1861) (striking through and extensive interlineations said to be done to make way for another disposition).

¹⁰⁸ See e. g., *Varnon v. Varnon*, 67 Mo. App. 534 (1896).

¹⁰⁹ *Smith v. Runkle*, 97 A. 296 (N. J. Prerog., 1915), affirmed 96 N. J. Eq. 257, 98 A. 1086; I Woerner Sec. 49; *Strong's Appeal*, 79 Conn. 123, 68 A. 1089 (1906). (Here, however, the later draft will took away a life estate in premises, the fee of which had been given to a brother, and purported to give the entire estate to the brother and the former will was destroyed. Held, no revocation, but the similarity of the two warrants that result); *Wolf v. Bollinger*, 62 Ill. 368 (1872); *Wells v. Wells*, 20 Ky. 152 (1820) (Name of one executor erased and another substituted); *Laughton v. Atkins*, 1 Pick. 535 (Mass., 1823) ("How can I know from the will itself that she would not have preferred that the first will should stand, rather than that the heirs-at-law

revoked will, there is reason for applying dependent relative revocation, whether the act should be regarded as conditional or whether as Professor Warren suggests, revocation actually has occurred, but is to be set aside on equitable grounds, the essential similarity of the two.¹¹⁰

Frequently it is declared that a revocation by act to the document is an equivocal act.¹¹¹ This accords with Professor Warren's assumption that dependent relative revocation is and should be a matter of intention. Just what sort of evidence, however, will resolve the doubt is seldom clear. A close similarity between the new and the old may well determine that there was no absolute intent to revoke.¹¹² Proof of a wide variation of the later ineffectual disposition from the earlier one should resolve the doubt in favor of giving effect to the revocatory act.

d. The Substitute is Contemplated Only

In contrast with the cases where the testator has prepared a substitute (invalidly executed) either by way of interlineations or by separate writing, are those cases where a substitute

should enjoy the estate?"); *Thompson's Appeal*, 114 Me. 338, 96 A. 238 (1915); *Smith v. Runkle*, *supra*; *Jackson v. Holloway*, *supra*, n. 97; *Penniman's Will*, 20 Minn. 245 (1874) (see also *Varnon v. Varnon*, *supra*, n. 108, where testator had become dissatisfied with his will, which provided for his sister and desired to have the property go rather to his wife and son. He tore out one page and substituted another, which was unexecuted. Dependent relative revocation caused that disposition to stand which he had sought to avoid. Intestacy would have accomplished approximately the desired distribution). See I Page on Wills, Sec. 450, pp. 727-728.

¹¹⁰ *Wilbourn v. Shell*, 59 Miss. 205 (1881); *In re Battis*, 143 Wis. 234, 126 N. W. 9 (1910) (will rewritten in order to correct its spelling and make it more legible and old will destroyed); *Onions v. Tyrer*, 2 Vern. 742 (Ch. 1717). Compare *West v. West* 2 I. R. 34, 55 Ir. L. T. xxviii (1921); *Estate of Irvine*, 25 T. L. R. 41 (1908), and *Clarkson v. Clarkson*, 2 Sw. & Tr. 498 (Eccl., 1862) (destroyed will was held revoked and nothing was said about the similarity of the intended substitutes).

¹¹¹ *Overall v. Overall*, *supra*, n. 83 (Date erased and earlier date inserted, which change of date the court thinks has a revocatory effect, but it is disregarded, because no intent to revoke); *Brown's Will*, *supra*, n. 83; *Penniman's Will*, *supra*, n. 109; *Bethell v. Moore*, 119 N. C. 311 (1837) (court says that the revocation of the earlier will was dependent upon the validity of the later one); *Means v. Moore*, *supra*, n. 98 ("man" cancelled "woman" inserted); *Drury's Will*, 22 N. B. 318 (Can., 1882) (the burden of proof is upon the one who asserts that the will was revoked in whole or in part); *Powell v. Powell*, L. R. 1 P. & D. 209 (1866); *Burtenshaw v. Gilbert*, 1 Cowper 49, 98 Eng. Rep. 961 (1774).

¹¹² Cases in n. 111, *supra*.

is contemplated only, and in these cases the decisions are in sharp conflict. The English decisions in general hold that such a revocation is conditional,¹¹³ and that the act was performed merely as a step preparatory to the execution of a later writing. There is no apparent reason why such cases should be classified as being affected by dependent relative revocation, inasmuch as they might well be accounted for by the English result where there is a mistake of motive.

By the terms of the definition there should be some act to which the proposed revocation is related and on which it is dependent.¹¹⁴ Where the relative act has been performed it may be said that there is some logical basis (whatever one thinks of the result in individual cases) for its application, but where the act rests merely in contemplation, it is genuinely difficult to discover any relative act upon which the prior act is dependent. Is there any sufficient reason for going beyond Jarman and treating such apparently independent acts as caused by mistake of motive? According to the English cases as shown, mistake of motive in revoking by act to the document causes the act to be ineffectual.

The American rule may be said to conflict with the English rule in this type of situation and to follow a sounder view¹¹⁵ in a majority of cases. Thus, it is not clear why mistake of motive should not on the one hand avoid a will, but should on the other hand make void the revocation of a will. There may

¹¹³ *Goods of Applebee*, infra, n. 119; *Goods of Weston*, L. R. 1 P. & D. 633 (1869) (Testator destroyed his will without explanation. Later the same day, he declared his intent to revive his former will. Held, dependent relative revocation applies; *Eeles' Goods*, 2 Sw. & Tr. 600, 164 Eng. Rep. 1130 (Eccl., 1862) (Testator cut out the names of the attestors, saying at the time that he had some idea of executing a new will. Later the same day he pasted in the removed parts—dependent relative revocation); *Dixon v. Treasury Solicitor* (1905), P. 42 (Testator destroyed his will, intending to execute another, which was never done—same rule). *Burtenshaw v. Gilbert*, supra, n. 88, and *Dickinson v. Swatman*, 4 Sw. & Tr. 205, 164 Eng. Rep. 1495 (Eccl., 1860).

¹¹⁴ Thus, in *Henry v. Frazer*, supra, n. 85, the doctrine is inapplicable unless it is proposed to probate the allegedly revoked will.

¹¹⁵ *Olmstead's Estate*, 122 Cal. 224, 54 P. 745 (1898); *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501 (1904); *Sanders v. Babbitt*, 106 Ky. 646, 51 S. W. 163 (1899) (mere intent to execute a later will does not prevent giving effect to the revocatory act); *Semmes v. Semmes*, 7 H. & J. 388 (Md., 1826) ("In consequence of the death of my wife, it becomes necessary to make a new will" which will was never made. The implication is that the new will would differ materially from the revoked will); *Johnson v. Brailsford*, 11 S. C. L. 272 (1820) (case is not satisfactory because it raises a question of revival of former will as a matter of intention to be passed upon by a jury).

be in these cases no evidence whatever as to the new disposition testator intended to make,¹¹⁶ or the testator may contemplate a radically different disposition.¹¹⁷ Special emphasis should be laid upon this fact. Thus, to have held with the lower court in *re Frothingham's Will*¹¹⁸ that there was a dependent relative revocation, would reach a shocking result. Testator had created various annuities and made his wife, who was the chief object of his concern, his residuary beneficiary. After having suffered serious losses, he determined that his wife would be unprovided for by his will in the present state of his affairs. He therefore struck through all the other items, and nothing remained except the provision for the wife. He planned a new will upon the basis of the old will thus mutilated, but it was never executed. Relying on *Goods of Applebee*,¹¹⁹ the lower court reversed the Orphan's Court's decree and held that the will should stand as if no partial revocations had been made, but the Court of Errors and Appeals held that the canceled provisions were revoked. The fact that testator meant to execute another, using the old will with its alterations as a model, made no difference. This seems so clearly sound that one wonders how the Prerogative Court could have reached any other conclusion. The mere intention, therefore, to execute a will in the future is generally insufficient in this country to prevent the revoking act from operating.¹²⁰

¹¹⁶ *Semmes v. Semmes*, *supra*, n. 115.

¹¹⁷ *Townshend v. Howard*, *supra*, n. 86; *Drury's Will*, *supra*, n. 59.

¹¹⁸ *Supra*, n. 13.

¹¹⁹ 1 Hagg. 143, 162 Eng. Rep. 536 (Eccl., 1828) (Testator had made certain alterations and desired a new will drawn conforming to it as altered. New will never executed. Held, old will conditionally revoked. Nothing here to show the extent of the alterations); *Powell v. Powell* (L. R. 1 P. & D. 209, 1866) (testator destroyed later will, bequeathing all his property to his nephew, intending to revive his former will. It does not appear who was the beneficiary under the revoked will, but inferentially it was not his nephew. Held, later will only conditionally revoked).

¹²⁰ *Brown's Will*, *supra*, n. 83 (Testator partially revoked his will. He intended to make a new one, but feared that he might die prior to its execution, and so left the emancipation provision untouched. Held, will partially revoked); *Sanders v. Babbitt*, 106 Ky. 646, 51 S. W. 163 (1899); *Townshend v. Howard*, *supra*, n. 86 (There was evidence that testator meant to make a new but radically different will; *Re Allen's Will*, 89 N. J. Eq. 208, 102 A. 147, 103 A. 1051 (1918) (court says there is a tendency in the decisions hostile to the extension of the doctrine); *In re Emernecker's Estate*, 218 Pa. 369 (1907) (will believed invalid was destroyed and testator intended later to make another); *Johnson v. Brailsford*, 11 S. C. L. 272 (1820) (Jury found an intent to revoke); *supra*, n. 115.

e. Cancellations and Interlineations Reducing the Gift or Changing the Beneficiary

There are some special illustrations of cancellations and interlineations which call for comment. Suppose the testator cancels the first legacy and inserts another at the end of his dispositions. There is no occasion to say that the two acts are related. There should be the same result if the insertion were made directly after the cancellation, there being no relation between the two acts, separate provisions having been made to separate beneficiaries. Does it make any difference that the name of one beneficiary is cancelled and that of another is inserted where the legacy remains the same? There are three situations. *Goods of Horsford*¹²¹ illustrates two of them. (a) In the will a paper had been pasted over the name of the donee, with a substituted donee written thereon, so that the original was no longer apparent, and (b) a similar act was done to the codicil where only the legacy was covered up and a different sum had been written above the original sum. The court regarded (b) as involving dependent relative revocation but not (a). This is a valid distinction. In (a) we find, in substance, a new gift to a new legatee, but in (b) we find a part of the original gift intended for the original legatee. In the first, therefore, there is no relation or dependency between the two acts and in the latter there is. The third situation (c) may arise as in *Knapen's Will*,¹²² where there is a complete cancellation of both gift and donee and substitutions written above each. This seems indistinguishable in result from situation (a), there being no difference between shifting a gift from A to B and the insertion of a new gift for B.

Since in (b) effect cannot be given to the smaller sum inserted and the testator did not wish to omit this beneficiary entirely, there is some basis for applying dependent relative revocation. The cover is removed, not for the purpose of making apparent that which is not apparent [as would have been the case if the covering had been removed in (a)], but rather for

¹²¹ L. R. 3 P. & D. 211 (1874). See also *In re Knapen's Will*, 75 Vt. 146, 53 A. 1003 (1903). (It seems *inter alia* that figures fixing the amount of certain legacies had been cancelled and different figures (increasing the amount) were inserted and the name of certain legatees were cancelled and other names inserted in the margin).

¹²² *Supra*, n. 121.

the purpose of procuring the most reliable evidence of what the original provision was. Even oral evidence is permitted as to the original provision where it is available. In (a) there is no occasion to apply dependent relative revocation unless perhaps it should turn out that the name of the beneficiary was identical with the one ineffectively written in, which would make the act purposeless.¹²³ It must be admitted that there are decisions applying dependent relative revocation even where there is a change of both beneficiary and the amount of the gift.¹²⁴ Where the amount of a legacy has been reduced but the gift otherwise remains, there seems to be no exception to the rule laid down in *Locke v. James*,¹²⁵ that dependent relative revocation applies.¹²⁶

The possibility of a new type of partial revocation by way of reduction may be suggested. In *Locke v. James*, the testator made a gift of six hundred pounds which he later desired to alter to two hundred pounds. This was done by a stroke through "six" and writing an unattested "two" above it. If this is to be construed as an act of destruction accompanied by an act of creation, as the courts have invariably regarded the transaction, the purpose cannot be carried out, as the act of creation must be attested. If testator had used the symbols two hundred plus two hundred plus two hundred, the possibility of reduction by cancellation is unquestionable under the statute then in force. "Six" is a symbol known as a phonogram just as "6" is an ideogram, but they are not susceptible as are the other symbols of reduction, by partial elimination of the symbol. To omit a part of "six" or of "6" leaves a meaningless quantity. Perhaps the ideogram "8" could be so mutilated as to leave the ideogram "3" and the ideogram "4" could be so mutilated as

¹²³ Professor Warren, in 33 Harv. L. Rev. 337, 345, n. 32, thinks the distinction unjustifiable. Naturally, it would be difficult to say that £10,000 reduced to £1 indicated dependent relative revocation. It is hard to speculate in advance just to what amount of alteration that doctrine should apply.

¹²⁴ e. g. *Wolf v. Bollinger*, *supra*, n. 109; *Stever v. Kendall*, 1 Cold. 557 (Tenn., 1860); *Pringle v. McPherson*, *supra*, n. 73 (Knapen's Will, *supra*, n. 121).

¹²⁵ 11 M. & W. 901 (Exch., 1843). See also *Kirke v. Kirke*, 4 Russ. 435, 38 Reprint 868 (Ch., 1828), and *Short v. Smith*, *supra*, n. 79.

¹²⁶ See among others, *Gardner v. Gardner*, 65 N. H. 230, 19 A. 651 (1890); *Brooke v. Kent*, 3 Moore P. C. 334 (1840) (attempt to reduce £200 to £100 and £400 to £200).

to leave the ideogram "1", though similar mutilations in the corresponding phonograms would not be possible.

Both oral and written language consists of symbols. Many of these symbols are words and it is an essential of a word that it be pronounceable. A word consists of a group of letters in the same way that a sentence consists of a group of words and so each consists of a group of symbols. The significance of symbol groups consists as well in the order in which the symbols are placed as in the separate meanings of the symbols. So ideas may be expressed by both phonograms (words) and ideograms (non-pronounceable symbols) such as 1, 2 and the symbols for "plus", "times", "divided by", etc.

As said above, sometimes a change in the meaning of a written sentence may be made by simply striking out a part of the symbols. If a testator had before him six hundred pounds which he meant to give to X and then changed his mind and decided to give him two hundred instead, he would not remove the entire six hundred and put in its place two hundred pounds. He would rather remove four hundred and thus leave two hundred. Can this process be shown intelligibly by a possible symbol, to be a reduction, a simple act, rather than two acts, one of destruction and another of creation? If it were desired to reduce "\$500" or "five hundred dollars" to "\$5" or "five dollars" it can be done by striking the symbols, the zeros, or the word "hundred".¹²⁷ The stroke is itself a simple, uncompounded symbol, but since it is not appropriate for the reduction of "6" or "six" to "2" or "two", a complex symbol, to represent however a simple act, becomes necessary. It consists in *Locke v. James* (a) of the stroke through the word "six", (b) the insertion of the word "two", and (c) the spacial relation between them.¹²⁸

¹²⁷ *Tudor v. Tudor*, 56 Ky. 383 (1856) (The word "hundred" stricken in two bequests respectively of "five hundred" and "seven hundred" dollars). See *Goods of Nelson*, Ir. R. 6 Eq. 569 (1872) (dependent relative revocation applies, where a substituted figure was inserted, whether of a smaller or larger amount, and evidence will be sought to prove the original but where no substitution, there is a revocation, save where the original is legible).

¹²⁸ It is assumed that of two possible analyses the simpler one is preferable. Thus, in *Locke v. James*, reduction is simpler than destruction united with creation. Reduction is a simple negative act subject to degrees. Nothing is created. In reducing we do not subtract the whole and then add one-third. We could do so and get the same result, but the method is needlessly complex. To adopt the complex

So in the converse case, where testator purports to revoke by later codicil in order to increase the gift, e. g., strikes "\$500" and inserts "\$700" there is no revocation, because the symbol is not a symbol of reduction, but rather becomes a symbol of partial creation, an addition to the original gift.¹²⁹

There is some analogy in certain cases where an allegedly revoked legacy to charity was held only partially revoked. Thus, if the testator gives by will a sum to charity and during the period within which charitable bequests cannot be made he revokes by words only the original legacy and gives "instead thereof" a lesser sum, it has been held that there was in reality only a reduction rather than a revocation, so that what is left is provided in a will appropriately executed with respect to time.¹³⁰

CONCLUSION

It is observable that the American statutes on revocation by act to the document are much looser than the English statutes where such a revocation is possible only when the original provisions are not apparent. Duplicates afford needless trouble and the practice of execution of two wills should be discouraged, preservation of a carbon copy being preferable. It is believed that a statute which permits partial revocation (where no other than the residuary clause is increased by it) accomplishes generally the purposes of testators. It is often inconvenient to re-draft a will in cases where the elimination of certain provisions may be desired. While the same result can be reached by signing, attesting and subscribing the alterations, the testator is likely not to be aware of it. Acts of mutilation or destruction not made at the behest of the testator should have no revocatory effect under the general rule that a revocation requires *animus*

method violates a well known rule applied to scientific hypotheses called "Occam's Razor," or the law of parsimony, "*Entia non sunt multiplicanda praeter necessitatem*." In mathematics the corresponding principle is that of "elegance." When a theorem can be proved in several different ways, the mathematician generally prefers the simplest or the most elegant proof. In the case of partial revocation, the remaining provisions of the will are not recreated. So when a sum is partially reduced, is it reasonable to demand that the remainder of the sum be recreated?

¹²⁹ *Carpenter v. Wynne*, 252 Ky. 543, 67 S. W. (2d) 688 (1934) (Court says there was no intent to revoke). *Re Wilcox's Will*, 20 N. Y. S. 131 (Sur., 1892) ("s" in seven erased and "el" replaced the "s").

¹³⁰ See 22 Ky. L. Jour. 469, 489-490 (1934).

revocandi and an appropriate act, which in most cases must be done at the instigation of and in the presence of the testator.

It will be a long time before the last word will be said concerning dependent relative revocation. The misapplication of the Roman law maxim had its influence. Since there is no general agreement in this country respecting the situations for which the doctrine becomes a useful device, this paper proposes that its application be limited as follows: It applies (a) only where the revocation is by act to the document; (b) only where there is some substitute, either by way of interlineations or a new writing, both unexecuted; and (c) only where the proposed substitution is essentially similar to the rejected will or provision. Thus, one excludes (1) revocation by an inoperative, but well executed subsequent writing; (2) revocation by act to the will where another writing is contemplated only; and (3) revocation by act to the will where there is a substitution but it is essentially dissimilar. One may also exclude (4) the case where the testator desires to alter a legacy, which alteration he seeks to accomplish by a stroke through the original sum and by the writing of a lesser sum above it. The possibility of this exclusion depends upon the transaction being regarded as a *reduction* rather than a revocation and an attempted new creation. The desire of the testator thus becomes fully accomplished.

Many cases of revocation under a mistake of motive have been treated as dependent or conditional. There appears to be no sufficient reason why such cases should not follow the general rule on mistake of motive in other types of unilateral transactions. Dependent relative revocation should be regarded merely as a device to secure desired ends and should be subject to modification from time to time according as it does or does not promote those ends. Statutory regulation of the application of it may be desirable.